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No. 92-1677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BEN JONES, JOHN ISAAC, HARVEY ECHOLS, JIM THORNTON, SHERMAN JONES, and HENRY WASHINGTON,

Petitioners,

v.

FIRESTONE TIRE AND RUBBER COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners misstate or omit facts in their Questions Presented for Review that are material to issues relating to the denial of the class certification. A more accurate statement of the issue is as follows:

Whether the Court of Appeals was correct in applying an abuse of discretion standard to affirm the denial of class certification (based on the putative class representative's lack of standing to raise a promotion claim), while remanding for further consideration the grant of summary judgment to defendant on said claim (based on disputed material facts) after *de novo* review of the possible merit of the individual claim?

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IN THE

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BEN JONES, JOHN ISAAC, HARVEY ECHOLS, JIM THORNTON, SHERMAN JONES, and HENRY WASHINGTON,

Petitioners,

v.

FIRESTONE TIRE AND RUBBER COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Bridgestone/Firestone, Inc. f/k/a The Firestone Tire & Rubber Company (hereinafter referred to as "Firestone") respectfully submits its Response to the Petition for Writ of Certiorari of Petitioners Ben Jones, John Isaac, Harvey Echols, Jim Thornton, Sherman Jones, and Henry Washington (hereinafter all collectively referred to as "Petitioners").

ADDITIONAL STATUTES INVOLVED

Petitioners omitted the following statutory citations:

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988) (hereinafter referred to as "Title VII").

2. 42 U.S.C. § 1981 (1988) (hereinafter referred to as "Section 1981").

3. 28 U.S.C. § 1254(1) (1988).

4. Fed. R. Civ. P. 23.

STATEMENT OF THE CASE

In their Statement of the Case, Petitioners mischaracterize the history of this action and the holdings below. Therefore, Respondent asks that the Court review the opinion of the Court of Appeals for the Eleventh Circuit[1] which: (1) affirmed the district court's November 28, 1989 denial of class certification, and (2) affirmed in part and reversed in part the district court's June 5, 1990 grant of summary judgment to the defendant with respect to Petitioners' individual claims.[2]

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[1] In the copies served on Respondent, the opinions of the Eleventh Circuit (hereinafter referenced as "Appl. Op., ____") and Judge Sam C. Pointer (hereinafter referenced as "Pointer Op., ____") appended to the Petition for Writ of Certiorari were not reproduced in their entirety. Therefore, these documents are appended hereto as Appendices A and B, respectively. (Respondent also notes that page 3 of the text of the Petition for Writ of Certiorari is apparently incomplete.)

[2] The Eleventh Circuit denied Petitioners' Petition for Rehearing and Suggestion(s) of Rehearing En Banc on October 27, 1992. (*See* Appendix C to the Petition for Writ of Certiorari.)

This action was filed on February 1, 1988 by Ben Jones, a former store manager in the Birmingham market of the Firestone retail store organization.[3] On October 12, 1986, Jones filed an EEOC charge in which he asserted both individual and class claims. The charge included a general allegation that Firestone "discriminates against black employees in job assignments, promotions, discipline, discharges, and other terms and conditions of employment." Pointer Op., B-6. Jones' lawsuit asserted claims both under Title VII and Section 1981. Jones later limited his request for class certification to black employees with promotion claims within the Southeast Region.

The district court allowed the intervention of five individual plaintiffs: John Isaac, Harvey Echols, Henry Washington, Jim Thornton, and Sherman Jones. Each had worked for Firestone in the Birmingham market at some point in "pivotal" (store sales) positions. None of these five individuals had filed EEOC charges.

In his November 28, 1989 decision to deny class certification, the district court (Pointer, J.) did not assess the merits of Ben Jones' claims. Rather, he evaluated whether Jones had constitutional standing to assert the class claims. *See* Pointer Op., B-6-10. Judge Pointer recognized that Ben Jones could represent the class only to the extent that he had standing to pursue his individual claims, as delineated by the scope of his EEOC charge. For this pro-

[3] At the time of the class certification hearing, the Birmingham market was one of five "metro markets" in Firestone's Southeast Region. The Southeast Region also included "non-metro markets" and "major metro markets." Each individual market within the three larger groupings was headed by a market manager, and functioned autonomously with respect to personnel issues. *See* Pointer Op. B-2-3.

position, Judge Pointer relied upon the Eleventh Circuit's decision in *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988), a decision that this Court declined to review.

Judge Pointer held that Jones' "viable complaints under Title VII are limited to matters that occurred between April 15, 1986—180 days before filing the charge—and August 20, 1986—the date he quit." Pointer Op., B-6-7. The court further determined that no vacancies had occurred in the Birmingham market during the relevant time period above the store manager level. Pointer Op., B-7. Thus, Jones could not claim any injury with respect to promotions above store manager.

Judge Pointer also held that Jones could not represent the claims of black pivotal employees who had been denied promotions to store manager positions because Jones, himself a former store manager, had not suffered any such injury. In addition, the court found that Jones' EEOC charge did not provide a basis for claims by non-pivotal employees, such as technicians (mechanics) or brake installers, because promotions of non-pivotals to pivotal positions were "aberrations from the normal promotional progression." Further, Jones was hired as a pivotal and "did not personally have any such claim." Pointer Op., B-9-10. The court rejected Jones' claims regarding denial of promotions outside the Birmingham market because Jones "did not suffer such discrimination." Pointer Op., B-8.

The district court held that Jones' EEOC charge provided a basis only for claims concerning transfers to store manager vacancies in better stores within the Birmingham district. Therefore, Jones could only represent black pivotal employees within the Birmingham Market. Evidence at the class certification hearing established that there

were, at maximum, thirteen black employees who might be members of that class, and therefore the numerosity requirement of Fed. R. Civ. P. 23(a)(1) was not satisfied. Pointer Op., B-10-11. Accordingly, Judge Pointer denied class certification. Contrary to Petitioners' version of the facts, Judge Pointer did not reach the issue of whether Jones met the other Rule 23 requirements for a class representative.[4]

Subsequent to the denial of class certification, the case was transferred to Judge Edwin L. Nelson, who in June 1990, granted summary judgment for Firestone on all of Petitioners' promotion claims. This decision by a different judge was rendered in an entirely different procedural posture, based on a different record. Firestone later prevailed in a bench trial of Jones' demotion and retaliation claims.

The Eleventh Circuit affirmed the district court's denial of the class certification. Appl. Op., A-13. Petitioners completely mischaracterize this decision as holding that a court should weigh the evidence on the merits of the putative class representative's claims in making a standing determination. In fact, the only evidence that the district court considered pertained to the scope of Jones' EEOC charge and his standing to represent a class.

Applying the abuse of discretion standard of review, the Eleventh Circuit upheld Judge Pointer's findings regarding Jones' lack of standing to assert class claims, other than those promotion claims relating to store manager positions within the Birmingham market. Appl. Op., A-11-12.

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[4] In addition, the court denied a class based on Section 1981 because Jones' "typical promotional claims" did not meet the criteria set forth in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Pointer Op., B-6.

The court held that Jones "did not have a Title VII claim for promotions outside the Birmingham Market because Firestone had a policy against such transfers." Appl. Op., A-11. The evidence at the class certification hearing established without contradiction, as found by the courts below, that Firestone did not engage in inter-market transfers. Therefore Judge Pointer did not abuse his discretion by treating the Atlanta market vacancy as irrelevant to Jones' standing to represent a class. Appl. Op., A-11.

The Eleventh Circuit affirmed that Jones could not satisfy the numerosity requirement of Rule 23(a)(1) based on his limited promotion claim. Appl. Op., A-12-13. It also affirmed the district court's findings that Jones' Section 1981 claims did not implicate "a new and distinct relation" under the *Patterson* test and that he could therefore not represent a Section 1981 class. Appl. Op., A-12-13.[5] On February 4, 1993, the Eleventh Circuit granted a stay of the mandate until final resolution in this Court and the parties are currently engaged in settlement negotiations with respect to this case.

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[5] The Eleventh also affirmed in part and reversed in part the summary judgment granted to Firestone for the individual promotion claims asserted by Jones and the intervenors. Considering the record *de novo*, the court held there was a material triable issue as to whether Firestone has a policy against transfers to vacancies outside an employee's market. As discussed in detail below at pp. 12-13, the Court's reversal of this part of the summary judgment decision had no connection to its review of the class certification denial because of the different standards of review employed by the reviewing court and the different issues involved.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit properly affirmed the district court's denial of class certification.

In evaluating the district court's denial of class certification, this Court must review the record that the district court had before it—without the enmeshment of the later decision on the merits of Petitioners' individual claims. Contrary to Petitioners' assertion, the Eleventh Circuit opinion would not direct district courts to "weigh the evidence" on the merits of the putative class representative's claims at the class certification stage. In fact, the Eleventh Circuit did not in any way diverge from the established rule that the merits are not at issue in a class certification determination. Rather, the court recognized that a district court must first determine whether a named plaintiff has standing to bring his individual claims before addressing his representative capacity under Fed. R. Civ. P. 23(a).

In doing so, a district court is not limited to the allegations in the complaint. Based on the record at the class certification hearing, the district court properly found that the named plaintiff Ben Jones could not show any injury in the 180-day time period relevant in a Title VII action, except for his promotion claim regarding better store manager positions within the Birmingham market. Because there was insufficient numerosity for a class action on that claim, class certification was denied.

It is disingenuous for Petitioners to attack the court's consideration of matters outside the allegations of the complaint in making its determination of the putative class representative's standing. Indeed, Petitioners' sole contention is that the district court should have found that Jones had standing to assert a promotion claim for posi-

tions outside the Birmingham market, because there was evidence of a vacancy in another market at the class certification hearing. Petitioners fail to mention that there was also evidence at the class certification hearing that Firestone did not engage in such inter-market transfers; therefore, the vacancy was irrelevant. In short, Petitioners are not challenging the consideration of matters outside the complaint, but only that the court did not agree with their interpretation of such matters.[6]

In this case, Jones could not represent a Title VII class because the claims for which he had standing did not give rise to sufficient numerosity under Fed. R. Civ. P. 23(a)(1). Moreover, because Jones could not satisfy the "new and distinct" standard enunciated by this Court in *Patterson*, 491 U.S. at 185-86, he could not assert any viable Section 1981 claims, either individually or on behalf of the class.

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[6] This Court should not let Petitioners confuse the issue by examining the Eleventh Circuit's decision affirming summary judgment to Respondent on Petitioners' individual claims. That decision is not at issue in this petition.

REASONS FOR DENYING THE WRIT

I.

THE ELEVENTH CIRCUIT DID NOT CREATE A CONFLICT BY AFFIRMING THE DISTRICT COURT'S CONSIDERATION OF THE PLAINTIFF'S INDIVIDUAL STANDING BECAUSE IT IS A THRESHOLD REQUIREMENT FOR CLASS REPRESENTATION

Contrary to Petitioners' assertion, the Eleventh Circuit in no way directed the district courts to "weigh the evidence" of the merits at the class certification stage. Rather, the court affirmed the lower court's holding that plaintiff Jones lacked the requisite standing to assert several of his individual claims based on the evidence in the record. This inquiry is proper because standing is a threshold requirement for federal court jurisdiction under Article III of the United States Constitution. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

A party cannot represent the interests of others without first demonstrating that he also suffers from the same injury. *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962); *Griffin v. Dugger*, 823 F.2d at 1483. The Eleventh Circuit has long recognized that before a court evaluates the Rule 23(a) requirements for representation of a class, a putative class representative must first establish that he has standing individually. *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. Unit A 1981).[7] As observed by Chief Justice Burger in *Allee v. Meldrano*, "[s]tanding cannot be acquired through the back door of a class action." 416 U.S. 802, 829 (1974) (Burger, C. J., concurring).

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[7] In *Bonner v. Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions issued by the former Fifth Circuit prior to October 1, 1981.

It is well settled that under Title VII, a party can only assert claims arising within the 180-day period preceding the filing of his EEOC charge. 42 U.S.C. § 2000e-5(e). Accordingly, the district court initially focused on the effective scope of Jones' charge. Pointer Op., B-6-7. As detailed on page 4 above, Jones' charge provided a basis only for promotion claims with respect to better store manager positions inside the Birmingham Market. There was insufficient numerosity for persons with this claim under Fed. R. Civ. P. 23(a)(1). Therefore, Jones could not represent such a class. Pointer Op., B-10-11.

This Court instructed in *General Telephone Company v. Falcon* that it may be necessary for a court to "probe behind the pleadings before coming to rest on the certification issue." 457 U.S. 147, 160 (1982) (rejecting, *inter alia*, the named representative's "across the board" class claims). Indeed, Fed. R. Civ. P. 23 contemplates an evidentiary hearing during which all issues bearing on a plaintiff's capacity to represent a class are addressed.

It is ironic that Petitioners contend that the district court should not have considered evidence outside of the complaint.[8] At the same time, their only challenge of the district court's findings is based on evidence presented at the class certification hearing. Specifically, Petitioners rely on a market level vacancy filled by one Terry Dahlem in the Atlanta Market to show that Jones had a promotion

[8] The cases cited by the petitioners for this proposition address motions to dismiss. *See, e.g., Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) ("For the purposes of a *motion to dismiss*, the material allegations of the complaint are taken as admitted.") (emphasis added.) Therefore, no conflict exists between the Eleventh Circuit and other circuits as to what may be considered by a trial court in the context of a class certification determination.

claim for market level positions outside the Birmingham Market. *See* Petition for Writ of Certiorari, p.3. There is no mention of the Dahlem vacancy in the Complaint.

In other words, Petitioners want the court to "weigh the evidence" to assess standing, but only when it suits their purposes. Petitioners' argument completely ignores that the record at the class certification hearing conclusively shows, and the courts below found, that Firestone has a policy against inter-market transfers at the store employee level. The Eleventh Circuit held that it was not an abuse of discretion for the district court to find that the uncontroverted evidence of a policy against transfers gave Jones no standing to represent a class based on that claim. Therefore, Jones lacked standing to pursue a class claim based on the Dahlem vacancy under Title VII.[9]

The appellate court held that Jones' opposition to summary judgment on his individual promotion claim, however, did raise "genuine issues of material fact as to the existence and nature [of] vacancies to which Jones might have been promoted," and also that his individual "promotion claim may also be cognizable under 1981." Appl. Op., A-18-19. The court decided that the abuse of discretion standard insulated the district court's class standing ruling from disruption, while the vastly different *de novo* review and disputed material fact standards made Jones' individual disparate treatment promotion claim immune from summary judgment.

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[9] In addition, the Eleventh Circuit agreed with the district court's conclusion that any promotional opportunities inside the Birmingham Market that occurred during the two-year time period allowable for Section 1981 actions did not rise to the level of a "new and distinct relation," as required by this Court in *Patterson*, 491 U.S. at 185-86. Appl. Op., A-15-16.

Petitioners try to confuse the issue by mentioning the Eleventh Circuit's reversal of the district court's grant of summary judgment with respect to Jones' and the intervenors' individual promotion claims. Petitioners point out that, in this reversal, the Eleventh Circuit did not defer to the district court's findings regarding Firestone's transfer policy. This decision has no bearing whatsoever on the affirmance of the district court's earlier denial of class certification, because it was made in a wholly different procedural posture by a different judge on a different record and was reviewed under a different appellate standard (*de novo* rather than abuse of discretion).

The standards of review for a grant of summary judgment and for denial of class certification are completely different. Appl. Op., A-19, n.19. The Eleventh Circuit applied the appropriate standard of review to Judge Pointer's decision to deny certification, namely, whether the decision was an abuse of the court's discretion. The abuse of discretion standard for review of a class certification decision is widely accepted. *See, e.g., Adamson v. Bowen*, 855 F.2d 668 (10th Cir. 1988). In contrast, the Eleventh Circuit's review of "a district court's grant of summary judgment is *de novo*." Appl. Op., A-16; *see also Tackitt v. Prudential Ins. Co. of America*, 758 F.2d 1572 (11th Cir. 1985); *County of Vernon v. United States*, 933 F.2d 532 (7th Cir. 1991); *Ek v. Herrington*, 939 F.2d 839 (9th Cir. 1991); *Sulewski v. Federal Express Corp.*, 933 F.2d 180 (2d Cir. 1991). In other words, the Eleventh Circuit was free to disregard the district court's summary judgment findings.

Any court plays a more limited role in the summary judgment process than in the class certification context. In deciding summary judgment motions, it cannot weigh the evidence; it can only determine if there are any ma-

terial triable issues. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Applying the *de novo* standard, the Eleventh Circuit found that a triable issue existed as to whether Jones was eligible for the vacancy filled by Dahlem. This holding in no way impacts the court's ruling as to the denial of class certification based on Jones' lack of standing to assert a claim which establishes sufficient numerosity.

Petitioners also argue that Jones could lack individual standing at the time of certification and still represent the class claims, as long as he had a personal stake in the class claims. In support of this argument, Petitioners cite three Supreme Court cases: *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975), *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). These decisions do *not* concern the standing requirement, but instead address the mootness doctrine. Moreover, none of these cases holds that, at the time of class certification determination, a putative class representative can lack individual standing.

For example, in *Geraghty*, there was no question that the putative class representative, a prisoner who had been twice denied parole, had standing at the time of the class certification hearing to assert his claim challenging the parole release guidelines. 445 U.S. at 1207. Rather, the issue was whether he could still represent a class, after his release from prison but *subsequent* to the certification denial if the class was later certified. *Id.*[10] Indeed,

[10] The *Geraghty* court held that if a certification denial is reversed, a named plaintiff may still serve in his representative capacity, even though his claims expired after the denial of class

(Footnote continued on following page)

Petitioners cannot point to any case authority for the proposition that an individual who lacks standing at the time of the class certification can represent a class.

Finally, Petitioners imply in their Statement of the Case that the district court erred in not considering whether any of the intervenors could represent the class. *See* Petition for Writ of Certiorari, p. 6. But Petitioners fail to mention that the named plaintiff Jones was the only Petitioner who had filed an EEOC charge. Courts have long held under the "single-filing rule" that a non-filing plaintiff can assert a Title VII claim only to the extent that he can rely on a filing plaintiff's EEOC charge. *See, e.g., Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1012 (11th Cir. 1982); *Oates v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968). In other words, the intervenors were limited to the effective scope of Jones' EEOC charge. And the scope of Jones' EEOC charge did not raise any claims for which there was sufficient numerosity—regardless of whether the class representative was Jones or one of the intervenors.

In sum, the district court properly assessed whether Jones could establish any alleged injury during the applicable time periods under Title VII and Section 1981. Petitioners mistakenly suggest that this assessment compromises judicial economy. In fact, determination of a plaintiff's standing at the onset of a case serves an important "gate-keeping" function by limiting access only

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[10] *continued*

certification. *Id.* at 404. This Court still emphasized that the certification of the class must be proper before the named plaintiff can serve as a representative. *Id.* at 405. In the instant case, certification was not proper because the claims which Jones had standing to assert did not create sufficient numerosity to sustain a class action. Thus, the certification was denied.

to those parties with justiciable claims. Petitioners may prefer that the courts refrain from any standing analysis, and simply accept any conclusory allegations in a complaint that a plaintiff has been sufficiently aggrieved. However, that would not comply with the mandate of Article III of the United States Constitution.

CONCLUSION

For all of the foregoing reasons, Respondent Firestone respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7499

BEN JONES,

Plaintiff,

JOHN ISAAC, HARVEY ECHOLS, JIM THORNTON, SHERMAN JONES, HENRY WASHINGTON,

Plaintiffs-Intervenors, Appellants,

versus

FIRESTONE TIRE AND RUBBER COMPANY, INC.,

Defendant-Appellee.

No. 90-7755

BEN JONES,

Plaintiff-Appellant,

JOHN ISAAC, HARVEY ECHOLS, JIM THORNTON, SHERMAN JONES, HENRY WASHINGTON,

Plaintiffs-Intervenors,

versus

FIRESTONE TIRE AND RUBBER COMPANY, INC.,

Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Alabama

(October 27, 1992)

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and HILL, Senior Circuit Judge.

TJOFLAT, Chief Judge:

This case consolidates the appeals of Ben Jones (Jones) (No. 90-7755) and John Isaac, Harvey Echols, Jim Thornton, Sherman Jones, and Henry Washington (Intervenors) (No. 90-7499) from discovery, class certification, and summary judgment orders, and from trial verdicts in favor of defendant Firestone Tire & Rubber Co. (Firestone). This case is among the diminishing number of employment discrimination cases that must be decided under the rulings of the Supreme Court prior to the Civil Rights Act of 1991.

We affirm in part, reverse in part, and remand for further proceedings.

I.

Firestone is organized into various regions across the country. The Southeast Region encompasses eight states and is subdivided into five "zones": the Metro Market Zone, the Non-subdivided into five "zones": the Metro Market Zone, the Non-Metro Market Zone, and the three Major Metro Market Zones of Atlanta, Miami, and Tampa-Orlando. The Metro Market and Non-Metro Market Zones are further subdivided into five and eight markets respectively. Each of these markets comprises a group of stores in a particular geographical region. Each store employs a store manager, one or more assistant store managers, service managers, and retail salespersons ("pivotal employees"); and several technicians, installers and general service persons ("non-pivotal employees").

The Southeast Region is headed by a Regional Director. Each Zone is headed by a Zone Manager. Each market is headed by a Store Supervisor (in the Major Metro Market Zones) or a Market Manager (in the Metro and Non-Metro Market Zones). The Store Supervisors and Market Managers are assisted by Sales Administrators in each market.

Ben Jones was employed by Firestone from 1968 to 1986. In 1971, he became the first black Store Manager employed by Firestone in the Birmingham Market in the Metro Market Zone. He served in this position until 1983, when he was demoted to Assistant Store Manager. He was promoted to the position of Store Manager at Firestone's downtown Birmingham store in June 1984.

Chip Franklin became Market Manager of the Birmingham Market, and thus Jones' direct supervisor, in March 1985. In February 1986, Franklin instituted a policy that Store Managers were to remain in their stores during all business hours unless they had received Franklin's permission to leave. On Friday, August 15, 1986, Jones left his store for a dental appointment without Franklin's permission. He was also absent from the store on Saturday. The parties presented conflicting evidence about the measures which Jones took to notify Franklin of his dental appointment and continued absence.

On Monday, August 18, 1986, Franklin called Jones to his office to reprimand him for this incident. Franklin removed Jones from his position as Store Manager and offered him a choice between termination and a position as an Assistant Manager. On Tuesday, August 19, 1986, Franklin informed Jones that he had been unsuccessful in finding a Store Manager who wanted Jones as an assistant. Franklin offered him a position as a "floating" Assis-

tant Manager. Jones accepted termination on August 20, 1986, rather than acquiesce to the demotion.

On October 12, 1986, Jones filed an EEOC charge in which he asserted (i) that his threatened demotion was based on his race and was in retaliation for an earlier EEOC charge he had filed, (ii) that Firestone had a practice of assigning managers to stores based on "the racial composition of a particular store's clientele," and (iii) that Firestone discriminated on the basis of race with regard to "job assignments, promotions, discipline, discharges, and other terms and conditions of employment." Jones asked the EEOC for a right-to-sue letter and received one in August 1987.

On February 1, 1988, Jones filed a complaint under 42 U.S.C. § 2000e to 2000e-17 (1988) (Title VII), and 42 U.S.C. § 1981 (1988), based on these charges. He sued individually and on behalf of a class of "black persons who applied for employment, have been employed, or who may in the future be employed and who [suffered discrimination] because of their race in discipline, discharge, job assignments, promotions, demotion, and other terms and conditions of employment." He sought (i) a declaratory judgment that Firestone's employment procedures were in violation of Title VII, (ii) a permanent injunction against continuing violations, and (iii) reinstatement, back pay, damages, lost seniority, and lost pension and fringe benefit credits.[1]

Five members of the proposed class—John Isaac, Harvey Echols, Jim Thornton, Sherman Jones, and Henry Wash-

[1] "Title VII does not allow awards for compensatory or punitive damages; instead it limits available remedies to backpay, injunctions, and other equitable relief." *United States v. Burke*, ___ U.S. ___, 112 S. Ct. 1867, 1873, 199 L. Ed. 2d 34 (1992).

ington—were later permitted to intervene to assert claims on behalf of themselves and the class. None of the Intervenors had filed EEOC charges.

On November 28, 1989, the district court denied class certification for the putative class alleging racial discrimination in promotions.[2] In June 1990, the district court granted summary judgment for Firestone with regard to all claims of the Intervenors and, pursuant to Fed. R. Civ. P. 54(b), entered final judgments against them. The Intervenors appeal in No. 90-7499.

The district court also granted summary judgment for Firestone with regard to the claims of Jones "concerning discriminatory failure to promote, discrimination in job assignment, and constructive discharge." The court declined to enter final judgment on these claims pursuant to Rule 54(b). Jones proceeded to trial on his remaining claims: demotion and retaliation. On September 24, 1990, the judge conducted a bench trial and ruled in favor of Firestone on both claims. Jones appeals in No. 90-7755.

Three groups of issues are before this court. Part II discusses the issues involved in the district court's decision not to certify a class. Part III examines the summary judgments granted to the defendant. Part IV addresses the trial verdicts rendered. We affirm the denial of class certification and the trial verdicts. We reverse the summary judgments as to the promotion claims of Jones and the Intervenors, but affirm all other summary judgments. We remand for further proceedings concerning the promotion claims.

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[2] Although originally assigned to Chief Judge Sam C. Pointer, Jr., the case was reassigned to Judge Edwin L. Nelson after the denial of class certification.

II.

A district court's denial of class certification will not be disturbed absent an abuse of discretion. *See Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1569 (11th Cir. 1992); *Coon v. Georgia Pacific Corp.*, 829 F.2d 1563, 1566 (11th Cir. 1987); *Gilchrist v. Bolger*, 733 F.2d 1551, 1555 (11th Cir. 1984).

A plaintiff who seeks to represent a class must meet the requirements of both Fed. R. Civ. P. 23 and the underlying substantive law. At the time of the class certification hearing, Jones sought to represent a class of black Firestone employees who had suffered racial discrimination with respect to promotions. As we have noted before,

> any analysis of class certification must begin with the issue of standing and the procedural requirements of Title VII. Thus, the threshold question is whether the named plaintiffs have individual standing, in the constitutional sense, to raise certain issues. Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others.

Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987) (citations omitted), *cert. denied*, 486 U.S. 1005, 108 S. Ct. 1729, 100 L. Ed. 193 (1988); *see Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. Unit A July 1981) ("This constitutional threshold must be met before any consideration of the typicality of claims or commonality of issues required for procedural reasons by Fed. R. Civ. P. 23").[3] Here Jones

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

seeks to represent a class based on his Title VII and section 1981 claims. He may do so only to the extent that he has standing to bring individual claims.

A.

One who seeks to represent a class in a private Title VII suit must have standing to raise the claims of the class and must satisfy the procedural requirements of Title VII. *Griffin*, 823 F.2d at 1482. Title VII requires a plaintiff to file a charge with the EEOC within 180 days of the alleged unfair labor practice.[4] Pursuant to the "single-filing rule," "[a]s long as at least one named plaintiff timely filed an EEOC charge, the precondition to a Title VII action is met for all other named plaintiffs and class members." *Griffin*, 823 F.2d at 1492. This rule encompasses two essential requirements: "First, at least one plaintiff must have timely filed an EEOC complaint that is not otherwise defective . . . . Second, the individual claims of the filing and non-filing plaintiffs must have arisen out of similar discriminatory treatment in the same time frame." *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1011-12 (11th Cir. 1982); *see also Griffin*, 823 F.2d at 1492-93.

Only Ben Jones filed an EEOC complaint. Therefore, the first issue is the effective scope of his EEOC charge. The class may pursue only those claims arising "out of similar discriminatory treatment in the same time frame."

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[4] 42 U.S.C. § 2000e-5(e) (1988). This period may be extended to no more than 300 days if the aggrieved person first institutes "proceedings with a State or local agency with authority to grant or seek relief from such practice or institute criminal proceedings with respect thereto." *Id.*

Jones filed his EEOC charge on October 12, 1986. The charge alleged that Firestone discriminated on the basis of race with regard to "job assignments, promotions, discipline, discharges, and other terms and conditions of employment."

The district court determined that Jones' charge provided a basis for claim arising between April 15, 1986 (180 days before the charge was filed) and August 20, 1986 (the date Jones left Firestone). The court found that Jones only had standing to complain about "his demotion" and "his failure to be selected by [the Market Manager] for a transfer to any of the several Store Manager positions that were filled during the period and which may have provided an opportunity for increased earnings, albeit at the same level." No. CV-88-P-0170-S, slip op. at 5-6 (N.D. Ala. Nov. 28, 1989). The court found "no vacancies or promotions in the higher positions of Market Manager of Sales Administrator." *Id.* at 6.[5]

Based on these findings, the district court concluded:

> Jones' charge may be used as the foundation for claims by other pivotal employees in the Birmingham market that because of their race they were denied promotions to, or were demoted or discharged from, pivotal positions in this market. In other respects, the claims sought to be presented—whether on behalf of intervenors or class members—are beyond the scope of Jones' EEOC charge.

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[5] The district court restricted its examination to those positions within the Metro Market Zone.

Id. at 8.[6] The court excluded three groups based on Jones' EEOC charge: (i) those seeking jobs above Store Manager (because there were no such jobs in the Metro Market during the period), (ii) non-pivotal employees (because Jones was a pivotal employee), (iii) those seeking jobs outside the Birmingham Market (because Jones was not discriminated against with respect to these jobs). This left only the claims of pivotal employees in Birmingham who, like Jones, claimed to have suffered racial discrimination in their employment.

Jones argues that the district court drew the class too narrowly by excluding evidence of jobs outside the Birmingham Market. He claims that the evidence before the district court showed that there was a vacancy in the position of Sales Administrator in the Non-Metro Market Zone which was filled by Terry Dahlem in early August of 1986. Firestone does not dispute the fact of this vacancy, but argues that Jones neither sought promotion to this position nor was he eligible for a transfer to a market-level position in another Zone.

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[6] The court also stated:

> Jones' EEOC charge . . . provides a potential basis for class certification and for intervention by non-filing plaintiffs with respect to claims relating to promotions to the position of Store Managers, and the transfers and demotions of Store Managers within the Birmingham market. His charge presumably also provides a similar foundation for other promotions, transfers, and demotions of lower-rated pivotal employees made by Franklin, the Birmingham Market Manager. Jones' charge does not, however, provide a basis for claims of discriminatory selection of persons for jobs above that of Store Manager, such as Market Manager or Store Administrator—decisions that are beyond the effective scope of Jones' charge and that would be made on a different level of the defendant by different persons.

Id. at 6.

Jones does not argue that he applied for the Dahlem vacancy. Under the law of this circuit, he need not make such a showing. Firestone uses an informal promotion system in which it does not post openings or take applications for positions. In *Carmichael v. Birmingham Saw Works*, we held that

> when there is no formal notice of the job's availability, the plaintiff may have no means, within his own knowledge, of showing whether the employer considered him or not. Furthermore, when an employer uses such informal methods it has a duty to consider all those who might reasonably be interested, as well as those who have learned of the job opening and expressed an interest.
>
> Accordingly, a plaintiff makes out a prima facie case—that is, he creates a presumption of discrimination and forces the employer to articulate legitimate reasons for his rejection—as long as he establishes that the company had some reason or duty to consider him for the post. The employer cannot avoid a Title VII violation by showing that it incorrectly assumed that the plaintiff was uninterested in the job. When the plaintiff had no notice of or opportunity to apply for the job, such a reason for rejection is "legally insufficient and illegitimate."

738 F.2d 1126, 1133-34 (11th Cir. 1984) (quoting *Harris v. Birmingham Bd. of Educ.*, 712 F.2d 1377, 1383 (11th Cir. 1983)); *see also Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1560 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986).

Although Jones need not show that he applied for the Dahlem post, he must show that he was qualified for the position in order to made out a prima facie case of discrimination. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986, 108 S. Ct. 2777, 2784, 101 L. Ed. 2d 827 (1988) ("[A] prima facie case [of discriminatory treatment

contrary to Title VII] is ordinarily established by proof that the employer, after having rejected the plaintiff's application for a job or promotion, continued to seek applicants *with qualifications similar to the plaintiff's.*" (emphasis added)) (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 & n.6, 101 S. Ct. 1089, 1094 & n.6, 67 L. Ed. 2d 207 (1981)). Jones cannot meet this requirement, because the evidence at class certification tended to show that Firestone did not make inter-Zone transfers. In effect, one of the qualifications for the Sales Administrator may have been experience within the Zone. For a similar reason, the district court concluded that Jones was not discriminated against with respect to pivotal jobs outside the Birmingham market:

> According to plaintiffs, Jones' charge should serve as a basis for challenging pivotal promotions outside the Birmingham market but within the Southeast Region. *This contention suffers from the same flaw that affects their effort to attach promotions to Market Manager or Store Administrator—namely, that Jones did not suffer such discrimination.*

No. CV 88-P-0170-S, slip op. at 6 (N.D. Ala. Nov. 28, 1989) (emphasis added). At the class certification stage, then, the court did not abuse its discretion by finding that Jones had not shown that he was discriminated against with respect to any jobs outside the Birmingham Market.

We conclude that the district court properly assessed the effective scope of Jones' EEOC charge. First, Jones did not have a Title VII claim with regard to market-level jobs because no market-level jobs were available in the Metro-Market Zone. Second, Jones did not have a Title VII claim for promotions outside the Birmingham Market because Firestone had a policy against such transfers. Finally, Ben Jones had no claim that he had not been

promoted to a non-pivotal position. Based on his EEOC charge, Jones only had standing to pursue claims regarding promotions, transfers, and demotions relating to Store Manager positions within the Birmingham Market.

Having limited the scope of Jones' EEOC charge, the district court did not abuse its discretion in declining to certify a class. "[A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 2372, 72 L. Ed. 2d 740 (1982); *see also Griffin*, 823 F.2d at 1482; *Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1363 (11th Cir. 1984).

Rule 23(a) lists four prerequisites for a class action: numerosity, commonality, typicality and adequate representation.[7] Because the district court found the class as defined to consist of Jones, the Intervenors, one putative intervenor and "only seven other blacks who have been employed as pivotal employees in the Birmingham market and hence might be members of the class," No. CV 88-P-0170-S, slip op. at 8 (N.D. Ala. Nov. 28, 1989), it properly found that the putative class failed to meet the Rule 23 numerosity requirement. *See Cox*, 784 F.2d at 1553 (noting that less than twenty-one is generally inadequate

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[7] Rule 23(a) provides as follows:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

to meet the numerosity requirement). The district court did not abuse its discretion in refusing to certify a Title VII class.

B.

Jones also asserted his promotion claims under section 1981. While this case was pending in the district court, the Supreme Court suggested that typical promotion claims would not be cognizable under section 1981: "[Section 1981] covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." *Patterson v. McLean Credit Union*, 491 U.S. 164, 179, 109 S. Ct. 2363, 2374, 105 L. Ed. 2d 132 (1989). Although this holding has been overruled by Civil Rights Act of 1991,[8] appellants

[8] That Act amended 42 U.S.C. § 1981 by defining the phrase "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981).

Other circuits have considered whether the Civil Rights Act of 1991 applies retroactively to a case pending in the courts when it was enacted. *See Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 229-30 (7th Cir. 1992) (holding that Act is applicable only to conduct occurring after effective dates of Act); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 938, 940 (7th Cir. 1992) (declining to apply Act retrospectively on appeal or remand); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1371 (8th Cir. 1992) (concluding that the Act did not retroactively preserve a § 1981 promotion claim otherwise precluded under the Supreme Court's rule in *Patterson*); *Vogel v. City of Cincinnati*, 959 F.2d 594, 597-98 (6th Cir. 1992) (holding that the Act did not apply retroactively).

The district courts in the circuit which have ruled on the retroactivity issue are divided. *Compare Maddox v. Norwood Clinic,*

(Footnote continued on following page)

do not argue that this case should be decided under a retroactive application of that statute. They instead claim that *Patterson*, properly interpreted, does not exclude promotion claims of the sort Jones makes.

The *Patterson* Court considered the racial harassment, promotion, and discharge claims of a black teller and file coordinator in a North Carolina credit union. The plaintiff asserted her claim under section 1981. The Court found that the plaintiff's harassment claims were not cognizable under section 1981:

> By its plain terms, the relevant provision in § 1981 protects two rights: "the same right . . . to make . . . contracts" and "the same right . . . to . . . enforce contracts." The first of these protections extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment. The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established

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[8] *continued*

Inc., 783 F.Supp. 582, 586 (N.D. Ala. 1992) (concluding that Act is not retroactive); *Doe v. Board of Co. Comm'rs*, 783 F.Supp. 1379, 1382-85 (S.D. Fla. 1992) (applying *Bradley* test to conclude that Act does not apply retroactively); *with Watkins v. Besemer State Technical College*, 782 F.Supp. 581, 585 (N.D. Ala. 1992) (finding that the Act simply restored the law to its state before *Patterson*); *King v. Shelby Medical Ctr., Inc.*, 779 F.Supp. 157 (N.D. Ala. 1991) (same).

> contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.

491 U.S. at 176-77, 109 S. Ct. at 2372-73. The Court went on to suggest that most promotion claims would not be cognizable under section 1981:

> the question whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under § 1981. In making this determination, a lower court should give a fair and natural reading to the statutory phrase "the same right . . . to make . . . contracts," and should not strain in an undue manner the language of § 1981. Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981. Cf. *Hishon v. King & Spaulding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L. Ed. 2d 59 (1984) (refusal of law firm to accept associate into partnership) (Title VII).

Id. at 185-86, 109 S. Ct. at 2377; *see also Wall v. Trust Co. of Ga.*, 946 F.2d 805, 808-09 (11th Cir. 1991) (adopting *Patterson* test); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1519-20 (11th Cir. 1991) (remanding promotion claims for reconsideration in light of *Patterson*).

Under the test suggested by the Supreme Court in *Patterson*, then, the district court could have found that the promotions which Jones was denied did not rise "to the level of an opportunity for a new and distinct relation between the employee and the employer." The court concluded that Jones did not have a cognizable claim under section 1981 as interpreted by *Patterson* and was not able

to serve as a class representative for the putative section 1981 class. This was not an abuse of discretion, and so we affirm the district court's refusal to certify a section 1981 class.

III.

A district court should grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). The trial judge is not to weigh the evidence at summary judgment to determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2510-11, 91 L. Ed. 2d 202 (1986). Further, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255, 106 S. Ct. at 2513 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 1608-09, 26 L. Ed. 2d 142 (1970)). "Summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all evidence is viewed in the light most favorable to the non-moving party." *Morrision v. Washington County, Ala.*, 700 F.2d 678, 682 (11th cir.) (citing *Adickes*, 398 U.S. at 157, 90 S. Ct. at 1608), *cert. denied*, 464 U.S. 864, 104 S. Ct. 195, 78 L. Ed. 2d 171 (1983).

Our review of a district court's grant of summary judgment is *de novo*. *See Morrison*, 700 F.2d at 682. "When

we examine a decision granting or denying summary judgment, we apply the same legal standards that control the district court's determination." *Mercantile Bank & Trust Co. v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985). Under this standard of review, which is different from the standard at class certification, we cannot affirm the district court's summary judgments on the promotion claims.

A.

The district court granted summary judgment for Firestone on three of Ben Jones' claims: constructive discharge, promotion, and discriminatory assignment. Jones does not appeal the summary judgment on the constructive discharge claim.

1.

Jones alleged that he was a victim of discrimination in the refusal of Firestone to promote him to a position above Store Manager. At summary judgment, the district court found no evidence of any specific opening available to Jones during the 180 day period before the filing of the EEOC charge. The district court further concluded that the claims could not be raised under the longer limitations period of Section 1981 because of the rule enunciated in *Patterson*.

Jones claims that the record on summary judgment showed that there were vacancies available to him during the 180 days before he filed his EEOC charge. In the alternative, Jones claims that his promotion claims are cognizable under section 1981 despite *Patterson*. We reverse the grant of summary judgment on these promo-

tion claims since there were genuine issues of material fact as to the existence and nature of vacancies to which Jones might have been promoted.

Four elements must be shown to make out a prima facie case of disparate treatment under either Title VII or section 1981:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973); *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207 (1981); *cf. Patterson*, 491 U.S. at 186-87, 109 S. Ct. at 2378.

The district court granted summary judgment for Firestone because it found that Jones produced no evidence of any vacancy above Store Manager in the Birmingham Market during the applicable 180 day period. In doing so, it assumed the Dahlem vacancy was irrelevant.

It may be that the Dahlem vacancy, the Sales Administrator position in the Non-Metro Market Zone, is irrelevant. However, we are unable to discern the reasoning of the district court on this point. Jones produced evidence which, if believed, showed that (i) Firestone did make inter-zone transfers, and (ii) that he had expressed interest in transfers outside the Metro Market Zone. It is reasonable to infer from this evidence that he was qualified to

fill the Dahlem vacancy. This is a genuine issue of material fact, and summary judgment was inappropriate on Jones' Title VII promotion claim.[9]

Jones' promotion claim may also be cognizable under section 1981. Again, the district court does not appear to have considered whether the Dahlem vacancy offered "an opportunity for a new and distinct relation between the employee and the employer." *Patterson*, 491 U.S. at 185-86, 109 S. Ct. at 2377. The record at summary judgment, construed in the light most favorable to the nonmovants, suggests that this is a genuine issue of material fact.

Since we find that summary judgment was inappropriate on the promotion claims of Ben Jones, we reverse and remand for further proceedings.

2.

Jones also alleged that he was the victim of discriminatory assignment in that Firestone followed a practice of assigning black Store Manager to stores that had a predominately black clientele. Such assignments effectively limited black managers to stores with lower income potentials. Again, the district court granted summary judgment, concluding that the record revealed no vacancies during the 180 day period before the EEOC charge was filed. The district court again found that *Patterson* precluded pursuit of this claim under section 1981.

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[9] The court, in the exercise of its broad discretion regarding certification of a class, was entitled to weigh the conflicting evidence regarding inter-zone transfers and conclude that Jones was not eligible for the Dahlem vacancy. Nevertheless, the standard is very different for our review of summary judgment. The plaintiff's evidence, and the justifiable inferences from it, present a genuine issue of material fact which precluded summary judgment.

Jones claims that the record on summary judgment showed that there were vacancies. He points to the court's certification opinion: "[Jones failed] to be selected by [the Market Manager] for a transfer to any of the several Store Manager positions that were filled during the period and which may have provided an opportunity for increased earnings, albeit at the same level." No. CV 88-P-0170-S, slip op. at 5-6 (N.D. Ala. Nov. 28, 1989). In the context of the opinion, this excerpt does not suggest that the district court found such vacancies, but merely that it assumed vacancies for the sake of argument. Even assuming such vacancies, the court rejected certification of the discriminatory assignment class for want of numerosity. Jones also ignores the lapse in time between the two opinions. The record before the court at summary judgment clearly showed that "there were no store manager vacancies between April 15, 1986 and August 20, 1986." No. CV 88-P-0170-S, slip op. at 8 n.5 (N.D. Ala. June 5, 1990). The court correctly rejected this argument.

The district court was also correct in holding that store assignment claims are not cognizable under section 1981. As lateral transfers they did not rise "to the level of an opportunity for a new and distinct relation between the employee and the employer." *Patterson*, 491 U.S. at 185, 109 S. Ct. at 2377.

We affirm the summary judgment order in favor of Firestone on the store assignment claims.

B.

Because we hold that it was improper to grant summary judgment for Firestone on Jones' promotion claims, we also remand the promotion claims of the Intervenors for further proceedings pursuant to the single filing rule.

See Griffin, 823 F.2d at 1492 ("As long as at least one named plaintiff timely filed an EEOC charge, the precondition to a Title VII action is met for all other named plaintiffs and class members.").

Conversely, because we find that Jones did not have any other valid claims under Title VII or section 1981, we affirm the summary judgments as to the Intervenors' other claims.

IV.

Jones proceeded to trial on his last two claims: demotion and retaliation. Factual conclusions reached by the district court are subject to a "clearly erroneous" standard of review on appeal. Fed. R. Civ. P. 52(a); *see Anderson v. Bessemer City*, 470 U.S. 564, 573-76, 105 S. Ct. 1504, 1511-12, 84 L. Ed. 2d 518 (1985).

The elements of any claim under Title VII, which will necessarily vary in "differing fact situations" are (i) that the plaintiff is a member of a protected class, (ii) that the plaintiff was qualified for the position in question, (iii) that the plaintiff suffered an adverse employment decision, and (iv) that this adverse decision was causally related to the status of the plaintiff as a member of the protected class. *McDonnell Douglas*, 411 U.S. at 802 & n.13, 93 S. Ct. at 1824 & n.13.

The district court's statement of the elements of Jones' demotion and retaliation claims was substantially correct. On the demotion claim the court stated from the bench "Mr. Jones has got to prove that he is a member of a protected group . . . . He's got to prove that an adverse employment action was taken . . . . He has got to prove that he was treated more harshly than persons not in the protected group under similar circumstances." The court

found that Jones failed to demonstrate that "he was treated more harshly than persons not in the protected group under similar circumstances." This finding was not clearly erroneous.

On the retaliation charge the court stated "Mr. Jones would have to show that he engaged in a protected activity . . . that some adverse employment action was taken against him, [and] a causal connection between the EEOC charge in 1980 and the action taken in August of 1986." The trial court found that Jones failed to establish such a causal connection. This finding was not clearly erroneous.

V.

The district court acted within its discretion in declining to certify a class of black Firestone employees. It also acted appropriately in granting summary judgment on the non-promotion claims of Jones and the Intervenors. The trial verdicts in favor of Firestone were not erroneous. We affirm these rulings.

Summary judgment was inappropriate on Jones' promotion claims and on those of the Intervenors. We reverse these rulings and remand for further proceedings.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BEN JONES, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No.
-vs-	)	
	)	CV 88-P-0170-S
	)	
FIRESTONE TIRE & RUBBER COMPANY,	)	
	)	
	)	
Defendant.	)	

OPINION

Pending before the court is the plaintiffs' request that this case be certified as a class action on behalf of all blacks employed by Firestone within its Southeast Region since October 12, 1984, with respect to claims they have been, or will be, denied promotional opportunities to "pivotal" positions and above in violation of Title VII or 42 U.S.C. § 1981.[1] On January 17, 1989, an evidentiary hearing under Fed. R. Civ. P. 23 was conducted, and the parties subsequently filed additional briefs based on that evidence. The ruling has been regrettably delayed, in part

[1] Also pending are motions to intervene by Marvin Grant, Willie Mallory, and Sherman Jones, and Firestone's motion for the court to reconsider its order allowing intervention by Ned Vandiver.

because of continuing developments in the law relating to claims of "adverse impact" and the ambit of 42 U.S.C. § 1981.

I. Ben Jones' Complaint.

The action was filed on February 1, 1988, by Ben Jones. Jones, a black man, had been employed by Firestone in 1968 at one of its stores in the Birmingham market as a salesperson. He had progressed through a series of jobs at different stores in the Birmingham market, with his last promotion being in June 1984 to the position of Store Manager at the downtown Birmingham store. On August 20, 1986, he quit after being told he would have to take a demotion to Assistant Store Manager or be fired. On October 12, 1986, he filed an EEOC charge in which he asserted that his termination from the position of Store Manager was based on his race and in retaliation for an earlier EEOC charge. In this 1986 EEOC charge he also complained that Firestone had a practice of assigning managers to stores based on the racial composition of the stores' clientele and included a general assertion that Firestone "discriminates against black employees in job assignments, promotions, discipline, discharges, and other terms and conditions of employment." Jones' complaint broadly makes these same charges on behalf of himself and a class of other blacks similarly situated, but his request for class certification is limited to claims of racial discrimination in making promotions.

II. Firestone's Organizational Structure.

Firestone's Birmingham market consists of 17 stores and is under the direction of a Market Manager. Each store has a Store Manager, one or more other "pivotal" em-

ployees (Assistant Store Manager, Service Manager, and retail Salespersons), and several non-pivotal, or shop, employees (Technicians, Installers, and General Service Persons). Since his promotion to Market Manager in March 1985, Joseph Franklin has been the person who has made the decisions concerning promotions of persons to Store Manager in the Birmingham market, as well as transfers, demotions, and terminations of those Store Managers.

The Birmingham market is one of five "metro markets" in the eight-state area that comprises Firestone's Southeast Region. The others are Nashville, Memphis, Charlotte, and Jacksonville. These five relatively autonomous units, covering a total of 85 stores, are consolidated for administrative purposes under the supervision of the Manager of Metro Markets, David Stuart. Stuart makes the decisions concerning promotions of persons to positions of local Market Manager and Sales Administrator[2] in the metro markets. Prior to October 1986, when Stuart's position was created, decisions concerning those promotions were apparently made by the Regional Director.

In addition to the metro markets, Firestone's Southeast Region includes "non-metro markets" and "major metro markets." The organizational structure of these units is analogous to that for Birmingham and other metro markets.

There are 125 non-metro stores, each with a Store Manager. These stores are assigned to one of eight non-metro markets. Each non-metro market has a local Market Manager, who in turn is supervised by the Manager of Non-Metro Markets.

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[2] Sales Administrators support local Market Managers by providing accounting services respecting sales operations within their markets.

Firestone has three "major metro markets" in the Southeast Region: Atlanta (30 stores), Miami (38 stores), and Tampa-Orlando (40 stores). Store Managers of the stores in these markets report to a Store Supervisor, whose duties are essentially the same as those of local Market Managers. The two Store Supervisors in each major metro market report to the Manager of that Major Metro Market.

The Manager of the Metro Markets, the Manager of the Non-Metro Markets, and the three Managers of Major Metro Markets report to the Regional Director, David Luck. Luck has been the Southeast Regional Director since November 1987, when he succeeded Terry Sprott.

III. Interventions.

Starting in late June 1988, a series of motions to intervene were filed in this case by other blacks who were employed, or had been employed, at Firestone stores in the Birmingham market but who had not themselves filed charges with the EEOC. The initial motions were allowed by the court, without, however, ruling on whether such intervenors could take advantage of Jones' EEOC charges.

On August 25, 1988, the court permitted the following interventions: John Isaac, who had held the position of Store Manager at the Ensley Store;[3] Harvey Echols, who had been rehired as a Technician at the Village East store after earlier having held a position as Service Manager or Assistant Store Manager at the Ensley store; and Henry Washington, who had been terminated after two months' employment as a Retail Salesperson at the East

[3] A factual dispute exists as to whether Isaac was fired or voluntarily quit.

Lake store.[4] On January 5, 1989, the court permitted intervention by Jim Thornton, who had been discharged in September 1987 from a position as Store Manager of the Green Springs store. Each of these intervenors claimed that he had been denied promotions to positions as Store Manger (or Store Manager at larger stores), as Market Manager, or Sales Administrator. A similar claim is made by Sherman Jones, whose motion to intervene filed on January 6, 1989, has not been ruled upon: he was employed as a Retail Salesperson until September 1987 in two Birmingham stores.[5]

Intervention has also been sought by three blacks who have been employed outside the Birmingham market but within Firestone's Southeast Region: Ned Vandiver, who holds the position of Store Manager in the Atlanta Major-Metro Market after being demoted from a higher position; Willie Mallory, who resigned from a position as Store Manager in the same market; and Marvin Grant, who was discharged from a position as Store Manager in the Memphis market. The motions to intervene by Mallory and Grant have not yet been ruled upon and are opposed by Firestone. Firestone also requests that the court vacate an earlier order permitting Vandiver's intervention. None of these individuals had personally received any right-to-sue letters from the EEOC.

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[4] Washington asserts that he also served as an Assistant Store Manager.

[5] Jones asserts that he was also a "Protege" and Assistant Store Manager.

IV. Effective Scope of Ben Jones' EEOC Charge.

As indicated, the charge filed by Ben Jones with the EEOC asserts broadly that Firestone "discriminates against black employees in job assignments, promotions, discipline, discharges, and other terms and conditions of employments." The extent, however, to which this charge provides a basis for Jones to represent a class under Fed. R. Civ. P. 23 or for others to intervene to assert Title VII claims under the "single-filing rule" depends upon the particular claims which Jones may individually pursue under his charge. *See, generally, Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987) *cert. denied*, ____ U.S. ____, 108 S.Ct. 1729 (1988). In *Griffin* the Court of Appeals held that claims of a discriminatory testing procedure could not be presented either as class claims or as claims by a non-filing intervenor where the two plaintiffs who had filed EEOC charges—charging a wide array of discriminatory practices—had not personally been deprived of promotions because of the tests. The importance of Jones' EEOC charges has become especially critical since *Patterson v. McLean Credit Union*, ____ U.S. ____, 109 S.Ct. 2363 (1989), holding in essence that 42 U.S.C. § 1981 may not be used to pursue typical promotional claims such as presented by Jones, the intervenors, and the putative class.[6]

Jones filed his EEOC charge on October 12, 1986. His viable complaints under Title VII are limited to matters that occurred between April 15, 1986—180 days before fil-

[6] Plaintiffs' use of "adverse impact" as a basis for class certification would, moreover, presumably be unavailable were the case evaluated under § 1981.

ing the charge—and August 20, 1986—the date he quit.[7] What happened during that period about which he can complain? First, his demotion by Franklin on August 20th from the position of Store Manger; second, his failure to be selected by Franklin for a transfer to any of the several Store Manager positions that were filled during that period and which may have provided an opportunity for increased earnings, albeit at the same job position level. However, no vacancies or promotions in the higher positions of Market Manager or Sales Administrator occurred during that period.[8]

Jones' EEOC charge, therefore, provides a potential basis for class certification and for intervention by non-filing plaintiffs with respect to claims relating to promotions to the position of Store Managers, and the transfers and demotions of Store Managers within the Birmingham market. His charge presumably also provides a similar foundation for other promotions, transfers, and demotions of lower-rated pivotal employees made by Franklin, the Birmingham Market Manager.[9] Jones' charge does not, however, provide a basis for claims of discriminatory selec-

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[7] Jones argues that promotions after August 20, 1986, should be considered on the basis he was "constructively discharged" when he quit after being advised of his pending demotion to Assistant Store Manager. The doctrine of "constructive discharge" is, however, clearly inapplicable in these circumstances.

[8] Use of the two-year limitations period afforded by 42 U.S.C. § 1981, if that were applicable, would not change the situation. The action was filed on February 1, 1988. No vacancies or promotions to the position of Market Manger or Sales Administrator occurred during the period from February 1, 1986—two years before the date of filing—to August 20, 1986.

[9] Although Store Managers are involved in selection of lower-rated pivotal employees, Franklin has acknowledged that these decisions are made under this direction.

tion of persons for jobs above that of Store Manager, such as Market Manager or Store Administrator—decisions that are beyond the effective scope of Jones' charge and that would be made on a different level of the defendant by different person. *See Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987); *Hill v. Metropolitan Atlanta Rapid Transit Auth.*, 841 F.2d 1533 (11th Cir. 1988), *modified on other grounds*, 848 F.2d 1522 (1988).

According to plaintiffs, Jones' charge should serve as a basis for challenging pivotal promotions outside the Birmingham market but within the Southeast Region. This contention suffers from the same flaw that affects their effort to attack promotions to Market Manager or Store Administrator—namely, that Jones did not suffer such discrimination. Moreover, this contention was premised on the assertion that class claims could be rather simply presented under a theory of "adverse impact" by showing that Firestone's supervisors did not utilize wholly objective standards in selecting persons for promotion.[10] Their position is succinctly stated in their Reply Memorandum in Support of Class Certification (p.6):

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[10] Firestone asserts that its supervisors have been directed to use "measurable, objective criteria" in making promotions; *e.g.*, in promoting Store Managers the Birmingham Market Manager has considered attainment of sales and profit objectives, employee turnover, store appearance, customer complaints, and ability to direct the workforce, as reflected in formal, annual evaluations. Nevertheless, such criteria are themselves undefined, which results clearly in a substantial degree of subjectivity. *Cf. Watson v. Fort Worth Bank and Trust*, ___ U.S. ___, 108 S. Ct. 2777, 2786 (1988) ("[h]owever one might distinguish 'subjective' from 'objective' criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature").

> "The class-wide claims involve one issue: whether the defendant's multi-component, subjective promotional procedure violates Title VII of the Civil Rights Act of 1964 by having disparate impact on black employees and not being justified by business necessity. From the outset, it must be understood that the use of statistical evidence to prove impact will be minimal. Furthermore, disparate impact analysis does not look at the various reasons why the multi-component process affects black employees; rather it is only concerned with the bottom line, *i.e.*, why are blacks not holding higher level positions at Firestone. The reasons why a black is not promoted does not effect [sic] the defendant's defenses in this case."

This approach, however, has been explicitly rejected by the Supreme Court in *Wards Cove Packing v. Atonio*, ____ U.S. ____, 109 S.Ct. 2115 (1989), a decision issued subsequent to plaintiffs' brief and holding that disparate impact may not be established merely by showing of racial imbalance "at the bottom line." The Court held that even in a class action plaintiffs must demonstrate that some identified specific practice has created this impact,[11] and that, even in such cases, further exploration may be necessary with respect to whether the company's business justification defense is a pretext for discrimination. *See also Hill v. Seaboard Coast Line R. Co.*, 885 F.2d 804 (11th Cir. 1989).

Plaintiffs also contend that Jones' charge should be viewed as permitting claims by non-pivotal employees that

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[11] Note that, although the general policy here under attack—*i.e.*, Firestone's directive to its local Market Managers to select the best qualified person using "measurable, objective criteria"—is the same for the entire Southeast Region, the implementation of that policy, including the choice of the criteria to be used, will vary among the nineteen local Market Managers and Supervisors.

they were not selected to fill pivotal vacancies in the Birmingham market. The evidence, however, is clear that any such transfers would be aberrations from the normal promotional progression and that Jones, having been initially employed in 1968 into a pivotal position, did not personally have any such claim.

In summary, Jones' charge may be used as the foundation for claims by other pivotal employees in the Birmingham market that because of their race they were denied promotions to,[12] or were demoted or discharged from, pivotal positions in this market. In other respects, the claims sought to be presented—whether on behalf of intervenors or class members—are beyond the effective scope of Jones' EEOC charge. The interventions of Isaac, Echols, Washington, and Thornton, as previously allowed by the court, are therefore proper, as is the requested intervention of Sherman Jones. The proposed interventions by Grant and Mallory should, however, be denied; and the order that previously allowed intervention by Vandiver should be vacated.

V. Requirements of Rule 23.

One of the prerequisites for class certification is that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The evidence presented indicates that (in addition to the plaintiff, the intervenors, and the proposed intervenor) there are, at

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[12] For this purpose, a promotional opportunity would include the possibility of a transfer in the same position from one store to another with greater earnings potential.

a maximum,[13] only seven other blacks who have been employed as pivotal employees in the Birmingham market and hence might be members of the class. Rule 23(a)(1) is clearly not satisfied, and a class is therefore not to be certified. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir.) *cert. denied*, 479 U.S. 883 (1986) (less than twenty-one generally inadequate for class).

VI. Summary.

Based on the findings and conclusions recited, the court will by separate order (a) deny class certification, (b) grant the motion of Sherman Jones to intervene, (c) deny the motions of Marvin Grant and Willie Mallory to intervene, and (d) vacate its earlier order that had allowed intervention by Ned Vandiver.

This the 28th day of November, 1989.

/s/
Sam C. Pointer, Jr.
United States District Judge

[13] This count is based upon those employed as pivotals since October 1984. It may, of course, be that the employment of some of these terminated before April 15, 1986, or that some would not have claims of a denial of promotions after that date.